

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF ARIZONA**

3
4 **TORRES CONSULTING AND LAW**
5 **GROUP, LLC,**
6 2239 W. Baseline Road,
7 Tempe, AZ 85283

8 **Plaintiff,**

9 v.

10 **DEPARTMENT OF ENERGY,**
11 1000 Independence Avenue, S.W.
12 Washington, D.C. 20585

13 **Defendant.**

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

14 **INTRODUCTION**

15 1. Torres Consulting and Law Group, LLC (“TCLG”), by and through
16 undersigned counsel, files this action for declaratory and injunctive relief and seeks the
17 disclosure of public agency records and information improperly withheld by the
18 Department of Energy (“the Department”) pursuant to the Freedom of Information Act
19 (“FOIA”), 5 U.S.C. § 552, as amended.

20 2. To remedy these violations, TCLG seeks an order declaring that the
21 Department has failed to comply with FOIA by improperly and incorrectly withholding
22 information from disclosure, and injunctive relief ordering the Department to disclose
23 the requested documents and information immediately. TCLG alleges the following:

24 **PARTIES**

25 3. Plaintiff, TCLG, is a limited liability company, incorporated in the State of
26 Arizona, with its principle place of business in Tempe, Arizona. TCLG is a consulting
firm that oversees compliance on construction projects throughout the United States.

 4. The Department is an agency of the federal government of the United
States.

JURISDICTION AND VENUE

5. This court has subject matter jurisdiction over this action and personal jurisdiction over the Department pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331.

6. Venue is properly vested in this Court pursuant to 28 U.S.C § 1391(c) and 5 U.S.C. § 552(a)(4)(B). TCLG's principal place of business is in Tempe, which is in the District of Arizona.

STANDARD OF REVIEW

7. Pursuant to 5 U.S.C. § 552(a)(4)(B), this Court reviews the Department's denial of TCLG's FOIA request de novo.

STATUTORY BACKGROUND

The Freedom of Information Act

8. FOIA provides that federal agencies are required to disclose requested information to the general public unless the requested information falls under one of the nine narrowly construed disclosure exemptions.

9. A determination by the agency to comply with a FOIA request requires that the agency make records promptly available to the requester and to notify the requester of the agency's determination and the "reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552(a)(6)(C)(i).

10. Exemption 4 of the FOIA exempts only "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure to the public. 5 U.S.C. § 552 (b)(4).

11. When an administrative appeal is filed following an adverse determination for records in whole or in part is upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination. 5 U.S.C. § 552(a)(6)(A)(ii).

1 12. Following the Department's final order, the aggrieved party may seek
2 judicial review in the district where the requester resides or has a principle place or
3 business, or in which the agency records are situated, or in the District of Columbia,
4 pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B).

5 13. Under FOIA, the Court can award "reasonable attorney fees and other
6 litigation costs reasonably incurred in any case" when the complainant substantially
7 prevails. 5 U.S.C. § 552(a)(4)(E)(i).

8 9 **FACTUAL BACKGROUND**

10
11 14. On June 20, 2012, TCLG submitted a FOIA request to the Department's
12 FOIA Officer, Mr. Alexander Morris. A copy of the FOIA request is attached to this
13 Complaint as Exhibit A.

14 15. TCLG requested copies of documents related to the construction contract
15 described as HQ-2012-0013-F Solana Solar Generation Station project for the
16 Department of Energy (the "Project"), in Gila Bend, Arizona.

17 16. TCLG requested the following documents that the Department has created
18 and/or obtained pertaining to the Project:

- 19 a. Three (3) weeks of the most recent certified payrolls for Petrochem
20 Insulation, Inc. and Brand Energy Solution & Infrastructure A.K.A.
21 Brand Energy Services;
- 22 b. Fringe Benefit Statement including, if applicable, apprentices;
- 23 c. Copies of all conformances requested and/or submitted for the Project;
- 24 d. Copies of all conformance responses, approvals, denials, and/or
25 modifications issued by the Department of Labor (DOL) for the
26 Project;
- 27 e. The name of the bona fide apprenticeship program and evidence of the
28 formal certification by the DOL for a trainee program in which a
 trainee on the job may be registered, along with the terms of the trainee

1 program used by any contractor on the Project;

2 f. Copies of Davis-Bacon compliance interviews conducted by the
3 contracting agency for the Project, if applicable.

4 17. On December 26, 2012, the Department acknowledged receipt of TCLG's
5 request and noted that the "the responsive documents have been partially withheld
6 pursuant to Exemptions (b)(4) and (b)(6) of the Freedom of Information Act." A copy
7 of the letter along with excerpts of the redacted records are attached to this Complaint as
8 Exhibit B.

9 18. By letter to the Department's FOIA Office of Hearings and Appeals
10 Director, TCLG submitted an appeal to the partially withheld FOIA request concerning
11 the Project on January 24, 2013. An unsigned file copy of the appeal is attached as
12 Exhibit C.

13 19. In the appeal, TCLG asserted that the requested FOIA response was
14 excessively redacted by the Department. The improperly and incorrectly withheld
15 information resulted in unusable and unverifiable information.

16 20. On appeal, TCLG requested documents containing pertinent project
17 information including contract data and certified payrolls from the Department by
18 following the FOIA procedure and guidelines from the Department, necessary to ensure
19 adherence to the rules and regulations required under the Davis-Bacon and Related Acts
20 (DBRA).

21 21. On February 25, 2013, TCLG received a response from the Department's
22 Office of Hearings and Appeals Director, Poli A. Marmolejos, that "the DOE has
23 determined that the Appeal, Case No. FIA-12-0004, be denied." A copy of the letter is
24 attached to this complaint as Exhibit D.

25 22. The Department responded that the redacted information was correctly
26 withheld under FOIA Exemption 4 because it is considered a trade secret and/or
27 commercial or financial information obtained from a person that is considered privileged
28 or confidential and is protected from disclosure.

CAUSES OF ACTION

23. TCLG incorporates all allegations in the above paragraphs into this section by reference.

24. The Department has violated FOIA's requirement to respond to public records requests by improperly and incorrectly redacting the requested information under FOIA Exemption 4.

25. TCLG does not dispute that the information requested is primarily "commercial" and that the Department obtained the information from a "person," as defined by the courts.

26. The requested information is not a trade secret nor is it privileged or confidential.

27. Disclosure of the requested information (wage data and hours worked) would not substantially harm the prime contractor or subcontractor competitively.

28. Disclosure of the requested information is required by DBRA in order to ensure strict compliance with DBRA.

29. The Department's redacted response demonstrates that the Department is not exercising due diligence in responding to TCLG's request.

30. The legal standard of de novo review is applicable and the Department must carry the burden of proof in justifying the determination to withhold requested information pursuant to 5 U.S.C. § 552(a)(4)(B).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Declare that the Department's failure to provide TCLG with all of the information requested in its FOIA request violated FOIA as set forth above;

B. Order the Department to immediately provide TCLG with copies of all of the documents requested in FOIA;

- 1 C. Grant TCLG such other injunctive and declaratory relief as this Court deems
2 just and proper;
3 D. Retain jurisdiction over this case to ensure compliance with this Court's
4 decree; and
5 E. Award TCLG its reasonable attorneys' fees, costs and expenses incurred in
6 pursuing this action.

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8 Respectfully submitted,

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10 Dated this 15th day of April, 2013.

11 /s/ James E. Barton II
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